

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1183

To be argued by
ALAN R. KAUFMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1183

UNITED STATES OF AMERICA,
Appellee.

—v.—

SUEY WING NG,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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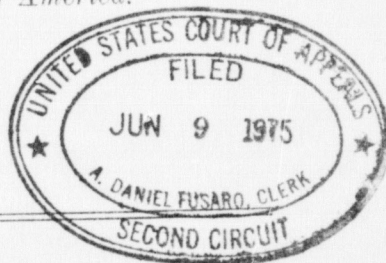




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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Suey Wing Ng appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on April 28, 1975, after a four day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury.

Indictment 75 Cr. 173, filed February 21, 1975, charged Suey Wing Ng, a/k/a "Ah Suey", in Count One with conspiracy to violate the federal narcotics laws, and in Counts Two through Seven with distributing and possessing with intent to distribute quantities of heroin, varying between one to three pounds, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846.*

* Indictment 75 Cr. 173 superseded Indictment 74 Cr. 953, filed October 11, 1974.

Trial commenced on March 24, 1975, and ended on March 28, 1975, when the jury convicted Suey Wing Ng on the conspiracy count, and was unable to reach a verdict on the six substantive counts.

On April 29, 1975, Judge Weinfeld sentenced Suey Wing Ng to three years imprisonment. Suey Wing Ng is currently free on bail pending appeal.

Statement of Facts

A. The Government's Case

1. Suey Wing Ng's Initial Heroin Sales to Danny Or

In July 1972, Danny Or, a/k/a "Ah Dau" purchased one kilogram of heroin from Lam Kin Sang.* Shortly thereafter in August 1972, Danny Or's friend, Ah Sai, was released from jail and began residing with Or at the latter's apartment. Ah Sai told Danny Or that he had a source from whom he could obtain heroin without having to pay for it in advance, as Danny Or had to do with Lam Kin Sang. Ah Sai and Danny Or agreed to try to do business with this source, and to split any resulting profits. Ah Sai arranged by telephone to meet with and obtain from his source a quantity of heroin. To that end, Ah Sai and Danny Or drove to Bayard Street in Chinatown where Ah Sai entered the Wing Chong Laundry and came out accompanied by another man, whom Ah Sai introduced to Danny Or as Wing Chong. At trial, Danny Or identified

* Both Danny Or and Lam Kin Sang were named in the indictment as co-conspirators, and testified for the Government.

Suey Wing Ng as the person he knew as Wing Chong (Tr. 30-31, 115-120, 216).*

Pursuant to Ng's instructions, all three then drove to Better Service Laundry, a laundry factory on Inwood Avenue in the Bronx, to pick up the heroin. There Ng met with and received from another individual a package, which Ng in turn gave to Ah Sai. Ah Sai and Danny Or later inspected the package at their apartment and found that it contained approximately one pound of brown rock heroin. They put aside some of that heroin for their own use and sold the remaining ten ounces for \$1,200 per ounce, after which Ah Sai paid Ng about \$7,000 for the heroin (Tr. 120-125, 224-225).

In virtually the same manner, and at the same location—the Bronx laundry factory—Ah Sai and Danny Or thereafter obtained from Ng two additional quantities of heroin: one pound in September 1972, and one and one-half pounds in October 1972.** After Ah Sai and Danny Or had succeeded in reselling this third quantity of heroin from Ng, Or entrusted Ah Sai with the money with which to pay Ng for the heroin. However, before he had an opportunity to pay Ng the money, Ah Sai was deported to Hong Kong. When Or thereafter visited Ng at the Wing Chong Laundry on Bayard Street and sought to purchase from him more heroin, Ng refused saying Or and Ah Sai had failed to pay him for the last one and one-half pounds he had sold to them (Tr. 126-130, 172-176).

* "Tr." refers to the trial transcript, and "GX" to Government Exhibit. While Danny Or throughout his testimony referred to the defendant as Wing Chong, hereinafter the defendant's true name of Suey Wing Ng, or Ng for short, is used for the sake of clarity.

** Frequently throughout this and other portions of the transcript, Ah Sai's name is mistakenly reported as Ah Suey. Ah Suey was one of Suey Wing Ng's nicknames—one which Danny Or did not know. Therefore when the name Ah Suey appears in connection with Danny Or's testimony, the reporter has erred and the correct reference is to Ah Sai.

2. Ng's Sales of Heroin Through Lam Kin Sang to Danny Or and Others: The Six Substantive Counts

During the period of October 1972 through January 1973, Ng effected six sales of heroin through Lam Kin Sang, whom he had met in New York at the Hong Gong Restaurant, 30 Pell Street in Chinatown, where initially Lam was employed as a waiter.*

Count Two. In October 1972 Ng told Lam he had one and one-half pounds of heroin available for sale at a price of \$11,500, and asked Lam to find a customer for the heroin. Ng gave Lam the telephone number of the Won Fung, *i.e.*, the Vikings Club, at 179 Canal Street, where Ng said he could be reached in the evenings (Tr. 7-14, 228-229).

Lam then advised the brothers Chan Yuk Shui and Chan Yuk Wo, his former partners in heroin dealings, of the availability of the heroin for \$11,500. A few days later, the Chan brothers advised Lam they had found a customer and furnished Lam with the money. That same day, pursuant to telephone instructions from Ng, Lam and the Chan brothers went to the Vikings Club, and from a third floor stairway therein one of the Chan brothers retrieved the package of heroin. Later that same evening Lam gave Ng the \$11,500 (Tr. 14-26).

Count Three. In November or December 1972, Ng visited Lam at a gambling club the latter had just opened at 83 Bayard Street, and there told Lam he again had one and one-half pounds of heroin for sale at \$11,500. As noted above, Danny Or had by this time lost Suey Wing Ng ("Wing Chong") as his source of heroin due to Ah Sai's

* Lam knew the defendant as Ah Suey, and that is how he referred to him in his testimony. Again, for purposes of clarity, the defendant's real name of Suey Wing Ng, or Ng, is used herein (Tr. 19).

failure to pay for their last purchase, and Or therefore turned for heroin to Lam Kin Sang, from whom he had previously purchased in July 1972. Or agreed to purchase the one and one-half pounds of heroin from Lam for \$16,500.*

Danny Or then found a customer named Rafael Colon, a/k/a "Baby", who agreed to buy the heroin for \$19,500. Baby in turn located two customers for the heroin: a woman named Anna Ortiz, who agreed to buy one-half pound of the heroin, and an undercover New York police detective named Raphael Rodriguez, who was to buy one pound of the heroin for \$15,000. On the evening of December 18, 1972, Danny Or and Rafael Colon met Anna Ortiz and the undercover agent. Ortiz and the agent paid their money to Colon, who in turn gave \$19,500 to Danny Or. Colon and Danny Or then drove to Lam's gambling club in Chinatown. Danny Or went inside, met Lam, and gave him \$16,500. Lam then called Suey Wing Ng and told Ng that he had the money. Ng told Lam that, as before, the heroin would be on the third floor staircase at the Vikings Club and that Lam should pick it up. Lam and Danny Or went to 179 Canal Street and picked up the heroin.** Danny Or then rejoined Colon and together they returned to Colon's apartment where they distributed one-half pound of heroin to Anna Ortiz and one pound to the undercover agent. Meanwhile, Lam returned to his gambling club and there later that evening paid Suey Wing Ng the agreed upon price of \$11,500 (Tr. 26-35, 130-139, 232-246; GX 10).

Count Four. About a week later, Suey Wing Ng told Lam that he had another one and one-half pounds of heroin

* Lam Kin Sang knew Danny Or by his nickname "Ah Dau", and so referred to him in his testimony.

** Lam testified that Danny Or went into the building to get the heroin. Danny Or testified that they both went into the building, and that Lam went up the stairs to the third floor and returned with the package.

to sell for \$11,500. Lam again secured Danny Or as the buyer for the heroin at \$16,500, and Danny Or in turn went directly to the undercover agent and agreed to sell him two pounds of heroin. Danny Or also found an individual named Jose who was willing to advance \$8,000 for one-half pound of heroin.* Using Jose's \$8,000, plus borrowed money and his own, Danny Or amassed the \$16,500, which he gave to Lam. Lam then called Suey Wing Ng and told him the money was ready.

Ng instructed Lam that the heroin was to be picked up as before at 179 Canal Street, and later that evening Lam and Danny Or retrieved the package from that location. That same evening, at Lam's gambling club, Lam paid Ng the \$11,500 agreed upon.

That night, upon inspection of the package he had purchased, Danny Or discovered it contained three, rather than the one and one-half pounds of heroin he had agreed to purchase. Also that night, Or obtained from Tommy, in Detective Rodriguez' presence, the additional one pound of heroin as previously arranged. That night and the next day, December 28, 1972, Or distributed to Jose and Detective Rodriguez one-half pound and two pounds of heroin, respectively. Detective Rodriguez paid Danny Or \$28,000 for the two pounds (Tr. 36-42, 140-151, 247-254; GX 11, 11-D).**

On December 28, 1972, Ng told Lam that the last package of heroin he had supplied had mistakenly contained an extra one and one-half pounds of heroin. Lam told Ng he knew nothing about it, but promised to make inquiries.

* Danny Or arranged to get the extra pound of heroin he needed to satisfy these two orders from an individual named Tommy who agreed to sell it to Danny Or on consignment.

** Of the one and one-half pounds of heroin left, Danny Or kept one-half pound for his own use and sold the remainder to an unidentified person.

Lam subsequently advised Danny Or that Lam's "person" had made a mistake, and asked Or whether the last package Or had purchased from Lam had contained an extra one and one-half pounds of heroin. Danny Or feigned ignorance, telling Lam that he did not know since he had simply turned the package over to another party. Danny Or told Lam that he would try to trace the heroin but, of course, he did not (Tr. 42-44, 151-153).

Shortly afterwards, Danny Or was arrested, tried, and convicted as a result of his dealings with Detective Rodriguez. He had no further dealings with Lam Kin Sang or Suey Wing Ng, and he never knew that the heroin he had purchased from Lam had come from Suey Wing Ng, the man he knew as Wing Chong (Tr. 153).

Counts Five, Six and Seven. Over the next few weeks, from December 1972 through January 1973, Suey Wing Ng sold through Lam three more quantities of heroin. Lam sold one and one-half pounds to Ja B Lam and Suey Nom for \$16,500. That heroin, as before, was picked up at 179 Canal Street, pursuant to Suey Wing Ng's instructions. Again, Lam transmitted \$11,500 to Ng.

Lam then sold another one and one-half pounds of Ng's heroin to Kam Shui. On this occasion, however, Suey Wing Ng brought the heroin to Lam at Lam's gambling club, explaining only that he had no place to put it. Lam sold it to Kam Shui for \$14,000, and thereafter gave \$11,500 to Suey Wing Ng.

A week or so later, Ng told Lam that he again had one and one-half pounds to sell, and Lam found a customer in Lee Louie, who was willing to pay \$16,500. Again, Suey Wing Ng delivered the heroin to Lam at Lam's gambling club. Lee Louie thereafter paid \$14,000 toward the full purchase price, and took the heroin. Subsequently, Lee Louie complained to Lam that the heroin was short,

that it weighed only one pound, and insisted that Lam refund \$2,000. Lam advised Ng of the complaint. Ng told Lam that the customer should pay only for whatever was there, and agreed to a \$10,000 price. Lam then refunded \$2,000 of the \$14,000 to Lee Louie's associate and subsequently Lam paid \$10,000 of the remainder to Suey Wing Ng (Tr. 45-62).

Within a few weeks, Lam's gambling house was closed by the police, and Lam also went on trial in an unrelated narcotics case. He had no further dealings with Suey Wing Ng (Tr. 62-63).

Suey Wing Ng was arrested on November 19, 1974 and a telephone book was seized from him. Contained in that book were the telephone numbers for the Hong Gong restaurant at 30 Pell Street, the Better Service Laundry at 1504 Inwood Avenue in the Bronx, and the Vikings Club at 179 Canal Street (Tr. 217-220).

B. The Defense Case

Suey Wing Ng testified in his own behalf. He came to the United States in 1966, and worked at the Better Service Laundry factory where he folded sheets for four years. He then opened his own store, the Wing Chong Laundry at 85 Bayard Street.

Ng admitted frequenting the Vikings, or Won Fung, Club at 179 Canal Street and admitted that he knew Lam Kin Sang and that they met in New York at the Hong Gong Restaurant. He denied, however, that they ever discussed or dealt in heroin. Ng testified that their only other contacts occurred when he lent to Lam \$200 as Lam requested; again, when he lent to Lam \$100 following Lam's request for another \$200 loan; and finally around Christmas 1972, when Lam again asked to borrow money, and Ng refused him.

Suey Wing Ng testified that he never met or saw Danny Or before he testified in court. Ng said he knew a man named Ah Sai slightly, but that they never dealt in heroin.* Ng testified that during 1972 he was in Virginia for a couple of months to apply for a driver's license (Tr. 269-287).

In addition to his own testimony, Ng called only two character witnesses (Tr. 259-267).

On cross-examination of Suey Wing Ng, the following evidence was elicited. Ng admitted that he came to the United States with a few thousand dollars, and that during the four years he worked at Better Service Laundry, he earned about \$80 a week, and his wife earned about \$4,000 a year. In 1970, he opened and operated the Wing Chong Laundry, but did not earn a profit. In 1971 the store netted a few thousand dollars, and in 1972 it netted \$17,000, which included his wife's income. Ng testified that in 1972 he had no other sources of income (Tr. 290-296).

Despite the foregoing, Ng acknowledged that during the period of July 1972 through January 1973, the balances in his savings and checking accounts increased by a total of more than \$25,000.** Ng sought to explain the apparent discrepancy between his \$17,000 income for all of 1972 (out of which he presumably had to pay for normal, everyday living expenses) and the \$25,000 increase in his bank accounts in just the last half of 1972, by claiming that he borrowed a lot of money from friends, in cash and interest-free, in order to expand his business. As of March

* The record incorrectly refers to Ah Sai as Ah Suey, the latter of course being a nickname for Suey Wing Ng.

** The Government sought to introduce the bank records which showed Ng's bank balances during the period of the conspiracy. The trial court excluded the documents, but allowed the Government to question Ng about the items and balances contained in the records (Tr. 221-223, 224, 297-298).

26, 1975, the day he testified, Ng admitted that the expansion had yet to be completed (Tr. 296-303). None of the alleged beneficent creditors testified, and Ng's only attempt to substantiate this story was to try to introduce into evidence a document showing that he borrowed money from a credit union in August 1973 (Tr. 317-320). Ng also admitted that in October 1973 he purchased an \$80,000, two-family house in Queens, on which he made a down payment of \$30,000. Ng claimed that of that \$30,000, less than \$10,000 was his own, and identified his two sons as the source of the remainder (Tr. 288-290, 306-307). Lastly, Ng admitted that the longest continuous period he spent in Virginia was about two weeks, and that at least on November 6, 1972 he was in New York, at which time he deposited \$1,200 in his savings account (Tr. 314-316).

ARGUMENT

POINT I

The Government was not required and did not fail to disclose before trial the evidence of Ng's three sales of heroin to Danny Or and Ah Sai not specifically alleged in the indictment.

Ng asserts that the government was required but failed to provide him before trial with notice of the evidence of Ng's three direct sales of heroin to Danny Or and Ah Sai in August through October 1972—transactions which were not specifically alleged in the indictment; and further that that evidence constituted proof of "other crimes" the introduction of which so surprised him as to deny him fair notice of the charges against him and due process of law. The argument is utterly without merit. The government was not required, either by generally applicable law or specific order of the trial court, to provide Ng with pretrial notice of the evidence challenged here for the first time. Moreover, Ng's failure to raise this issue below

deprived the government of an opportunity to make a factual showing which would have conclusively demonstrated that contrary to Ng's baseless charge, the prosecutor provided Ng's trial counsel with notice before the trial and at the earliest practicable moment of the evidence now in issue.

The evidence of Ng's three direct sales of heroin to Ah Sai and Danny Or, a named co-conspirator, during the life of the alleged conspiracy was directly probative of that conspiracy, constituting proof of other overt acts not alleged in the indictment and of the successful accomplishment of the conspiracy's objectives.* As this Court said recently in *United States v. Carroll*, 510 F.2d 507, 509 (2d Cir. 1975):

"There is no general requirement that the government disclose in a bill of particulars all the overt acts it will prove in establishing a conspiracy charge, *United States v. Iannelli*, 53 F.R.D. 482 (S.D.N.Y. 1971). See *United States v. Anderson*, 368 F. Supp. 1253, 1263 (S.D.Md. 1973)."

Accordingly, where, as here, the trial court has refused to order the government to make such pretrial disclosures, the government is under no requirement to do so.** The

* See Point II, *infra*, pp. 14-16.

** Ng did file on December 18, 1974 an omnibus motion seeking, *inter alia*, a bill of particulars which specified "Any additional Overt Acts not presently mentioned or set forth in the indictment herein, concerning which acts the Government presently intends to present and offer testimony upon the trial of the indictment herein." In its response filed January 15, 1975 (see Affidavit of Assistant United States Attorney Alan R. Kaufman, sworn to January 14, 1975, p. 6), the Government opposed that request; and Judge Weinfeld, in determining that omnibus motion, directed the Government to furnish promptly information as to the time and place of the overt acts and substantive counts alleged in the indictment, and denied the balance of the motion except to the extent consented to by the Government. See Memorandum Endorsement, Weinfeld, J., filed January 24, 1975.

same result obtains even assuming *arguendo* that the challenged evidence constituted proof of other uncharged and distinct crimes, as Ng contends, rather than direct proof of other overt acts of the conspiracy alleged, as the government asserts. Ng neither sought, nor was the government ordered to provide, under any other rubric, pretrial disclosure of the evidence complained of here. See *United States v. Carroll*, *supra*, 510 F.2d at 509.* And we know of no legal authority, and Ng has cited none, which imposes on the government, generally, a requirement to disclose before trial all of the elements of the testimony of a named co-conspirator, here Danny Or, pertaining to criminal conduct which occurred during the life of the alleged conspiracy and which were arguably part of that conspiracy.

Further, Ng's utter failure to bring to the attention of the trial court—in the form of an objection to the proffered testimony, a request for a continuance or a motion for a new trial—the government's asserted failure to disclose, itself warrants denial of this ground for relief. *United States v. Rivera*, Dkt. No. 74-2115 (2d Cir., March 13, 1975), slip op. 2262, 2283-2284 (Friendly, J.); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 385 U.S. 907 (1966). It is instructive that even now Ng is unable to say how the alleged surprise he suffered caused him substantial prejudice. He makes no representations as to what evidence he might then have offered, but failed to adduce because of surprise, to rebut the thrust of the challenged testimony. Indeed, Ah Sai, whose real name was unknown to Danny Or (the government's sole source regarding Ah Sai) and who was the only other direct participant in the three sales of heroin pertinent here, was unavailable to Ng, having been deported to Hong Kong. See *United States v. Tramunti*,

* For the government's argument that the evidence, no matter how characterized, was properly admitted, see Point II, *infra*, pp. 14-16.

Dkt. No. 74-1550 (2d Cir., March 7, 1975), slip op. 2107, 2152-53. In any event, the evidence of these three heroin sales "added only slight additional weight to the overwhelming evidence of [Ng's] participation in the [crimes charged]", *United States v. Carroll, supra*, 510 F.2d at 509, and any supposed failure to disclose such evidence before trial in the circumstances here hardly warrants reversal.*

Finally, Ng's entire argument rests on a totally false factual predicate. The government did in fact disclose the challenged evidence to Ng's trial counsel before trial. On March 20, 1975—some three days after the government itself first learned of the existence of the evidence and four days before the start of the trial—Assistant United States Attorney Alan R. Kaufman, the government's trial counsel, advised Thomas O'Rourke, Ng's trial counsel, of the existence of the evidence and the government's intention to elicit the same at trial.**

* The portion of Danny Or's direct testimony challenged here occupies only 15 pages of the entire trial transcript. The government's other abundant proof of the conspiracy and six substantive offenses charged included the testimony of Lam Kin Sang, undercover Detective Rodriguez and that portion of Danny Or's testimony which Ng does not challenge, as well as physical evidence of narcotics and Ng's book of telephone numbers and evidence of Ng's finances.

** It this Court determines that it is necessary for purposes of this appeal to reach and decide this issue of fact, the government would respectfully request that the matter be remanded to the District Court for an evidentiary hearing. At such a hearing, the government would establish the following through the sworn testimony of Assistant United States Attorney Kaufman.

Until about one week before trial Assistant United States Attorney Kaufman believed that Danny Or was going to testify only that he purchased heroin in December 1972 from Lam Kin Sang, and that Lam in turn would testify that the heroin he sold to Danny Or had come from Suey Wing Ng. Danny Or had

[Footnote continued on following page]

POINT II

The District Court properly admitted Danny Or's testimony of Suey Wing Ng's three sales of heroin to Or and Ah Sai.

Ng claims that the District Court erred when, without objection, it admitted Danny Or's testimony of Ng's three sales of heroin to him and Ah Sai in August through October 1972. Ng asserts that the challenged testimony con-

previously been asked a number of times whether he knew of, or had personal dealings with Suey Wing Ng, or Ah Suey as the defendant Ng was known. Danny Or said he knew of no such person. However, approximately one week before the trial was to begin (probably on or about March 17, 1975), Danny Or was shown a photograph of Ng and asked if he had ever before seen the person whose likeness was depicted therein. Danny Or told Assistant United States Attorney Kaufman that he knew that person as Wing Chong, and that he and a person named Ah Sai had purchased heroin on three occasions from Wing Chong during a period from about August through October 1972. During the next two days the government investigated Danny Or's revelations. By March 20, 1975, Assistant United States Attorney Kaufman decided to include this new evidence in the government's direct case as proof of the conspiracy charged. That same day, in a face-to-face meeting, Assistant United States Attorney Kaufman advised Mr. O'Rourke, Ng's trial counsel, of the existence of this new evidence of Ng's three sales to Danny Or and Ah Sai of a pound, a pound and a pound and one-half of heroin, respectively, and the government's intention to elicit such testimony through Danny Or who was to be a government witness. (A contemporaneously-made memorandum of that meeting by Assistant United States Attorney Kaufman is in accord with the foregoing and would also be offered at any such hearing.) Mr. O'Rourke responded that he might object at trial to such testimony on the ground that it constituted prejudicial proof of other crimes. Assistant United States Attorney Kaufman remarked that such an objection would be specious, but nonetheless determined thereafter to omit any reference to this evidence from his opening since he anticipated an objection at trial to its admissibility and hence its possible exclusion. When in fact the challenged testimony was offered and received at trial without objection, the government had no opportunity to make a record of the government's pretrial disclosure.

stituted proof of other crimes and was offered by the prosecution solely to prove Ng's criminal character. The argument is without merit.

The law is settled in this Circuit that testimony concerning other crimes is "admissible if it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value [citation omitted]." *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3584 (April 29, 1975); see also *United States v. Gerry*, Dkt. No. 74-2100, 74-2106 (2d Cir., March 28, 1975), slip op. 2583, 2599. Here it is plain that the evidence was not offered solely to prove criminal character.

Ng's three heroin sales to Danny Or, a named co-conspirator, and Ah Sai during the life of the narcotics conspiracy alleged were part of that conspiracy, *United States v. Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), and evidence of those sales was probative of overt acts committed by co-conspirators in furtherance of that conspiracy's objectives. It is immaterial that the overt acts thereby proved were not alleged in the indictment. The government may satisfy its burden of proof on the overt act element of a charged conspiracy by evidence of an overt act not alleged in the indictment. *United States v. Armone*, 363 F.2d 385 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966); *United States v. Negro*, 164 F.2d 168, 173 (2d Cir. 1947).

Danny Or's testimony concerning Ng's heroin sales to him and Ah Sai was relevant to show that Ng was "continuing along the same line" in selling heroin to the same named co-conspirator and others as specifically alleged in the indictment. *United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States v. Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972), *cert.*

denied, 410 U.S. 909 (1973). As this Court held in *Papadakis*:

"The charge of conspiracy to commit criminal acts always requires proof of a course of conduct that will circumstantially prove the corrupt agreement. There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes". 510 F.2d at 294-95.

Furthermore, Or's testimony of Ah Sai's failure to pay Ng for the last one and one-half pounds of heroin sold to Or and Ah Sai, and of Ng's consequent refusal to sell heroin to Or, served to explain to the jury why Ng thereafter engaged Lam's assistance in locating customers for the heroin, and corroborated Lam's testimony that he, indeed, did do so. As such, Or's testimony was admissible as showing the existence, purpose, scope, background and development of the conspiracy among its various participants. *United States v. Papadakis*, *supra*, 510 F.2d at 294-95; *United States v. Cioffi*, 493 F.2d 1111, 1115 (2d Cir. 1974); *United States v. Cohen*, 489 F.2d 945, 949-950 (2d Cir. 1973); *United States v. Del Purgatorio*, 411 F.2d 84, 86-87 (2d Cir. 1969); *United States v. Costello*, 352 F.2d 848, 854 (2d Cir.), *rev'd on other grounds*, as *Marchetti v. United States*, 390 U.S. 39 (1968); see also *United States v. Turcotte*, Dkt. No. 74-2380 (2d Cir., April 17, 1975), slip op. 2957, 2965; *United States v. Colosurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).

Finally, Ng's failure to object below to Or's testimony, challenged here for the first time, itself warrants denial of any relief. *United States v. Indiviglio*, *supra*. Ng's assertion that the trial court should have given the jury a limiting instruction with respect to the challenged evidence is without substance. Not only was the evidence directly probative of the conspiracy charged, but Ng failed to request any such instruction or object to the testimony itself.

POINT III

There was no prosecutorial misconduct during the trial.

Ng claims he was denied a fair trial by reason of repeated instances of improper conduct by the prosecutor. The claim is unwarranted.

Specifically, Ng claims the prosecutor's references to bank documents which were not in evidence constituted misconduct. A short recital of how the facts pertinent to this issue developed at trial will demonstrate the falsity of Ng's claim.

During the government's direct case, a bankbook which had been seized from Ng upon his arrest was offered in evidence* for the purpose of demonstrating that Ng's bank accounts increased in the latter half of 1972 by an amount greater than his total income for all of 1972, thus showing unexplained sources of income at the time when the government charged he was selling heroin. The trial court refused to admit the bankbook into evidence (Tr. 221-223), but advised the prosecutor:

"However, if you are talking about cross-examination, if you are really so much interested in the bank deposits, if the defendant takes the stand you can question him about that" (Tr. 224).

There was no further reference to Ng's finances in the government's direct case.

Ng testified in his own behalf. On cross-examination the government elicited that his total 1972 income was \$17,000 (Tr. 293). The government then intended to cross-examine Ng on the basis of all the bank documents in the govern-

* The Government also intended to offer subpoenaed bank records of other accounts of Ng's.

ment's possession which showed that his accounts increased by more than \$25,000 from July 1972 through January 1973. The government re-offered Ng's bankbook (Tr. 296-297). The following occurred:

"MR. O'ROURKE: I interpose the previous objection.

THE COURT: You can question him about the items there. You don't prove anything.

MR. KAUFMAN: Can I refer to the items in here without it being in evidence?

THE COURT: Yes, ask the witness about them" (Tr. 297-298).

Thereafter, the government, while showing the bankbook and the other documents to Ng, asked Ng about his bank balances and deposits in the latter half of 1972, and demonstrated the \$25,000 increase in his accounts (Tr. 298-306).

This clearly was in no way misconduct since the prosecutor followed the trial court's instructions in dealing with this matter. Moreover, Ng was in no way prejudiced by this procedure. Indeed, he benefited since the bank records offered were admissible and should have been received. See *United States v. Tramunti, supra*, slip op. at 2134-2135.

Ng also claims that the prosecutor's summation contained numerous misstatements which amount to reversible error. Reviewing the examples cited by Ng demonstrates that the prosecutor's comment was either correct or insignificant, and thus explains the absence of defense objection at trial.*

* Ng's failure to object below may of itself warrant denial of all or some of the alleged errors. *United States v. Indiviglio, supra*.

(a)* Ng attacks the prosecutor's statement that Lam King Sang sold heroin to the Chan brothers without profit "as a favor to the Chan brothers." While Ng is correct that Lam never testified in those specific words as to why he sold to the Chan brothers at no profit, Lam did testify that the Chan brothers were his former partners, and that they wanted to buy heroin and resell it in order to make money to pay attorneys' fees (Tr. 14-17, 31, 87, 88). Certainly one permissible inference from those facts is that Lam sold the heroin to his former partners without profit to himself as a favor to them. In any event, Ng has failed to demonstrate any prejudice whatever from this comment.

(b) In defense summation, counsel commented on the government's failure to call the Chan brothers as witnesses (Tr. 329). The prosecutor responded to that argument by saying, first, that the Chan brothers' testimony would have been useless since there was no evidence they had ever dealt with Ng and, second, that "if we could have the Chan brothers here, they wouldn't be here as witnesses, they would be subject to prosecution themselves and there is no reason to believe they would be willing government witnesses" (Tr. 334-335). Ng asserts that by this statement the prosecutor told the jury by implication that the Chan brothers had fled to avoid prosecution, a fact not in evidence. Ng's argument is the product of an extremely convoluted interpretation of the prosecutor's comment.** The more compelling interpretation is that it merely suggested that the Chan brothers, being subject to prosecution, would not have waived their Fifth Amendment rights. See *United States v. Kahn*, 472 F.2d 272, 288 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

* The subdivisions correspond to Appellant's Brief, pp. 39-42.

** Even accepting that interpretation, Ng fails to show how he was prejudiced.

(c) During Ng's cross-examination, he attempted to explain the increases in his bank accounts by claiming that the money came from friends repaying loans (Tr. 299), and also from friends and relatives lending him money (Tr. 303-306). In his summation, the prosecutor vigorously attacked the purported explanation, observing that not one of these asserted friends testified to corroborate Ng's story, and that Ng's only feeble attempt to corroborate it was to show that he borrowed money in August 1973, which the trial court correctly held to be irrelevant (Tr. 336-337). The government then argued that there was no explanation except for the following:

"The Government submits * the explanation is because that represents the profits that he made on his sales of heroin and every time he sold heroin he made \$2,000 here or \$3,000 there, depending on how much he had to pay for it" (Tr. 337-338).

(d) Ng correctly claims that the prosecutor mistakenly stated: "Ah Suey admitted [the package to Lee Louis was short]. 'Yes, I knew it was . . . short.'" Lam Kin Sang did not so testify, but he did state:

"Q. And what did Ah Suey say when you told him that the weight was not enough?

A. He said just pay for whatever there [sic] is there" (Tr. 61).

While Ng's immediate willingness to accept payment for whatever was in the package does not unequivocally prove that he knew the package was short-weighted, Ng's failure to protest that the package contained the one and one-half pounds as ordered warrants the reasonable inference that he did know. Accordingly, the prosecutor was justi-

* Ng's counsel here conveniently neglects to include these first three words in the quotation contained on page 41 of Ng's brief on appeal.

fied in arguing that this short-weighting was an attempt by Ng to begin to recoup the loss incurred in the earlier transaction in which he had mistakenly supplied an extra one and one-half pounds. Indeed, this argument would have been proper even in the absence of any testimony concerning Ng's direct knowledge, and based solely on the circumstantial evidence that Ng was the supplier of the heroin on both occasions. See, *United States v. Gerry*, slip op. at 2606.

(e) In responding to defense arguments regarding the accomplices' testimony and credibility, the prosecutor stated:

"Well, let's look at Lam Kin Sang and Danny Or. The first thing, they are self-admitted participants in this whole heroin trafficking scheme. The Government told you about them in the Government's opening statement and the witnesses admitted it right up front. They weren't hiding it" (Tr. 341).

Ng nitpicks that Danny Or was not mentioned by name in the government's opening. This is correct, and was done in part for reasons previously stated. See p. 14, n., *supra*. However, the government in its opening did mention Lam Kin Sang by name, did tell the jury about his narcotics involvement, and in that connection did hint that other accomplices would testify: "The government does not expect you to like Lam Kin Sang or any others like him . . ." (Appellant's Appendix 14a).

(f) In arguing that if Danny Or was going to lie, he would have made up a better story about Ng than that which he testified to, the prosecutor noted that Danny Or testified that he did not know that Ng ("Wing Chong") was the source of the heroin that Danny Or was buying from Lam Kin Sang. Ng now claims that Danny Or never so testified. During Or's direct examination, the follow occurred:

"Q. Did you ever know from whom Lam was getting his heroin, the heroin that you bought from Lam?

A. I do not know" (Tr. 153).

If Danny Or did not know who Lam's source was, it seems fair to say that he did not know that the source was Suey Wing Ng.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ALAN R. KAUFMAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 9th day of June, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Perrotta & Patten
80 Broad Street
New York, N.Y.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Alan R Kaufman

Sworn to before me this

9th day of June, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977